

REMARKS

Claims 1-10 are pending in the above-identified application. Claim 5 has been amended so as to properly depend from claim 1 in response to the claim objection addressed below.

Removal of Claim Objection

Claim 5 has been objected to as being in improper independent form for the reasons stated at the bottom of page 2 of the Office Action dated December 23, 2008. Claim 5 has been amended so as to properly depend from claim 1 so as to remove the basis for the objection. Thus, it is requested that the objection be withdrawn.

Issues under 35 USC 103(a)

Claims 1-4 and 8 have been rejected under 35 USC 103(a) as being unpatentable over Eicken '303 (USP 4,617,303). Essentially, it is the position of the Patent Examiner that compounds disclosed by Eicken '303 include homologs of the presently claimed compounds such that there is a presumption that the claimed compounds are "unpatentably obvious" over the homologs disclosed by Eicken '303 in view of *In re Hass*, 60 USPQ 544, 548 (CCPA 1944); and *In re Henze*, 85 USPQ 261 (CCPA 1950).

The above-noted rejection is respectively traversed based on the following reasons.

Submission of Haden Declaration

In order to further support the patentability of the present claims, Applicant hereby submits a Declaration under 37 CFR 1.132 (hereinafter the "Haden Declaration"). The Haden Declaration compares the closest disclosed examples of Eicken '303 against compound examples falling within the scope of the present claims. Specifically, the Haden Declaration establishes that compound examples within the scope of present claims exhibit unexpected, advantageous fungicidal properties over various examples disclosed in the Table of Eicken '303 shown at columns 5-8. The Haden Declaration compares various examples of the compounds of the present invention taken from Tables 1 and 2 as shown at pages 6-9 of the present specification.

The specific comparisons include Compound A-1 of Table 2 of the present application (R^1 is C_5 -alkyl with R^2 being n-butyl) which exhibits superior fungicidal properties over Example 16 of Eicken '303 (R^1 is C_4 -alkyl) in Example 1 of the Haden Declaration. In Example 2 of the Haden Declaration, Compound Example A-1 of Table 1 (R^1 is C_5 -alkyl with R^2 being n-propyl) exhibits superior fungicidal properties over Example 25 of Eicken '303 (R^1 is C_4 -alkyl) and Compound Example A-47 of Table 1 (R^1 is C_9 -alkyl with R^2 being n-propyl) exhibits superior fungicidal properties over Example 21 of Eicken '303 (R^1 is C_{10} -alkyl). In Example 3 of the Haden Declaration, Compound Example A-47 of Table 42 (R^1 is C_9 -alkyl with R^2 being n-butyl) exhibits superior fungicidal properties over Example 23 of Eicken '303 (R^1 is C_{10} -alkyl). Regarding the "alkoxyethylene" compounds of the present invention, the Haden Declaration shows that Compound Example A-84 of Table 1 (R^1 is C_6 -alkoxyethylene) exhibits superior fungicidal properties over Example 48 of Eicken '303 (R^1 is C_6 -alkoxypropylene). In addition, in Example 3 of the Haden Declaration, Compound Example A-86 of Table 1 (R^1 is C_8 -alkoxyethylene) exhibits superior fungicidal properties over Example 42 of Eicken '303 (R^1 is C_8 -alkoxypropylene). Consequently, it is submitted that these comparative test results in the Haden Declaration provide strong evidence of the patentability of the compounds within the scope of the present claims in view of the evidence of unexpected, advantageous fungicidal properties.

Distinctions over Eicken '303

Eicken '303 discloses various pyrimidine compounds of formula I as described at column 1, lines 17-52. Eicken '303 fails to disclose any compound examples within the scope of the present claims. As noted in the Office Action, Eicken '303 discloses some compound examples which are homologs of some compounds within the scope of the present claims, differing by one methylene group. This structural difference is significant as evidenced by the comparative test results shown in the Haden Declaration discussed above. These comparative test results establish that there is a significant amount of unpredictability associated with this structural difference which fails to be disclosed or suggested by Eicken '303. Thus, the above-noted

“Hass-Henze Doctrine” does not apply to the present situation, since the adjacent homolog compounds of the present invention exhibit unexpectedly and unpredictably improved fungicidal properties over the closest examples of Eicken ‘303. The evidence of unexpected advantageous properties provided in the Haden Declaration supports the patentability of the present claims over Eicken ‘303. *In re Chupp*, 816 F. 2d 643 646, 2 USPQ2d 1437, 1439 (Fed. Cir. 1987). Also see *In re Mills*, 281 F. 2d 218, 126 USPQ 513 (CCPA 1960). Therefore, it is requested that the above rejection be withdrawn.

It is submitted for the reasons above that the present claims define patentable subject matter such that this application should now be placed in condition for allowance.

If any questions arise in the above matters, please contact Applicant’s representative, Andrew D. Meikle (Reg. No. 32,868), in the Washington Metropolitan Area at the phone number listed below.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37.C.F.R. §§1.16 or 1.17; particularly, extension of time fees.

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Respectfully submitted,

By 

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Enclosure: Haden Declaration Under 37 CFR 1.132